NO. A09-1208

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State of Minnesota
In Supreme Court

Maureen Kissack,

Appellant,

vs.

Sheila M. Montognese, Bridget Beaudry, Lori France, Sandra Taverna, John Sandahl, and Steven Sandahl,

Respondents.

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF THE CASE

This case originated in the Cass County District Court with the Honorable John P. Smith presiding. It involved the Estate of Patrick W. Butler ("Butler") who died on February 1, 2008. App. A-0002 (Finding of Fact 1). Appellant Maureen J. Kissack is Butler's daughter. App. A-0002 (Finding of Fact 2). Ms. Kissack was the named Personal Representative and petitioned to probate Butler's Last Will & Testament. Butler's probate assets consisted of a lake home that sold for approximately $250,000, miscellaneous personal property, and other assets. *See* Transcript at P. 85, L. 9-25; P. 86, L. 1-18; P. 119, L. 11-21. His non-probate assets consisted of two life insurance policies where the identified beneficiaries included some or all of his natural children, but none of his stepchildren from his marriage to Viola Sandahl, and the accounts at issue, which included five Certificates of Deposit (CDs) at the Woodland Bank totaling approximately $100,000. App. A-0002 (Finding of Fact 5). These accounts were held in joint tenancy with survivorship rights to Appellant. *See* Transcript at P. 99, L. 1-25; P. 100, L. 8-25. *See also* Addendum at Page 2.

Respondents are two of Butler's natural children and all of his stepchildren. Respondent Sheila M. Montognese petitioned the trial court to have the CDs included as part of the estate assets. On October 16, 2008, a hearing was held before Judge Smith on a petition to remove the Personal Representative.

Unexpectedly, the judge allowed testimony on not only this issue, but also on the ownership of the CDs. An Order was issued November 4, 2008. App. A-0001 through A-0004. This Order found no grounds to remove Appellant as Personal Representative, but did find clear and convincing evidence that Butler wanted all of his property divided equally amongst all of his children and stepchildren. App. A-0004.

The trial court listed the factors that it considered in deciding that the CDs were an estate asset. App. A-0002 through A-0003. These included the language of Butler's will and that of his former spouse, the collateralization of a portion of the CDs, the lack of evidence that Appellant was entitled to a greater share or that she contributed to the CDs, and the source of the funds. Appellant brought a motion relating to the propriety of the trial court's actions, specifically its deciding the issue without proper notice or the assistance of a jury, and requesting that the ruling be vacated and a jury trial be held to determine the issue. The trial court granted Appellant's request.

On March 10, 2009, a jury was impaneled to determine whether there was clear and convincing evidence that Butler had an intention contrary to that expressed on the face of the CDs, i.e., that they become the sole property of Appellant. Ultimately, the jury determined that there was clear and convincing

evidence to support that the decedent had an intention other than that Appellant take the CDs as the surviving joint owner.

Prior to trial, the district court denied Appellant's motion in limine to preclude admission of Butler's and Viola Sandahl's wills and to limit testimony on the relationship between the parties and other factors. *See* Transcript at P. 6, L. 5 through P. 10, L. 10. Following the conclusion of Respondents' case in chief, Appellant moved for a directed verdict, which was denied. *See* Transcript at P. 98, L. 2-4. After the jury rendered its verdict, Appellant requested judgment not withstanding the verdict and/or a new trial. This motion was heard on April 10, 2009, and the trial court issued an Order on May 5, 2009, denying the request. App. A-0005 through A-0008.

Appellant appealed the trial court's May 5, 2009 order. App. A-0009. The trial court's ruling was affirmed in a 2-1 decision of the Court of Appeals. App. A-0011 through A-0029. Appellant's petition for review of the Court of Appeals' decision was subsequently granted by this Court. App. A-0030.

STATEMENT OF FACTS

Patrick W. Butler had three natural children. His second wife, Viola Sandahl, had five children. Each prepared a Last Will & Testament and signed it

on December 6, 1996. *See* Trial Exhibits 32 and 63. Both wills had similar provisions. Article IV of Mr. Butler's Last Will read as follows:

ARTICLE IV

> I hereby give, devise and bequeath my property, real, personal and mixed, including but not limited to my interest in real property, IRA's, insurance policies and checking accounts, wherever so located, to Viola M. Sandahl if she survives me by thirty days.
>
> If Viola M. Sandahl does not survive me by thirty days, or if we die under circumstances which would be deemed a common disaster, I then leave my entire estate in equal shares to the following named persons who are alive at the time of my death: Bridget A. Beaudry, Sheila M. Cooper, Lori M. France, Maureen J. Kissack, Sharon F. Sax, Jack K. Sandahl, Steven K. Sandahl, and Sandra E. Taverna.

See Addendum at Page 1.

Ms. Sandahl died on May 2, 1997, approximately six months after preparation of the wills. App. A-0002 (Finding of Fact 3). No estate issues arose after Ms. Sandahl's death.

In 2000, Butler opened an account at the Woodland Bank and purchased five different CDs the total value of which was approximately $100,000. *See* Transcript at P. 93, L. 7-8. In 2003, he renewed these CDs. *See* Transcript at P. 99, L. 4-5 and L. 13-19. *See also* Trial Exhibit 108. Each CD had identical terms and required Butler to make a choice of how each would be held. For each CD, Butler elected a joint account with survivorship rights, and named Appellant as his joint account holder. *See* Addendum at Page 2. Butler could have chosen another

alternative from several that were set forth on the forms, such as a joint account with no right of survivorship, but did not. *See* Transcript at P. 100, L. 4-25; P. 101, L. 6-12 and L. 21-22. No one disputed that Butler made this election, or claimed that the election language was ambiguous. The effect of each ownership option was clearly explained in writing on the forms, including the option selected by Butler, joint ownership with a right of survivorship:

> Each of you intend that upon your death the balance in the account (subject to any previous pledge to which we have consented) will belong to the survivor(s).

See Addendum at Page 2. *See also* Transcript at P. 100, L. 8-25. The bank manager, Craig Johnson, (*see* Transcript at P. 98, L. 20-21) reviewed the entire file and testified that there was no documentation or other information that suggested Butler had intended anything other than for Appellant to be the joint tenant with right of survivorship. *See* Transcript at P. 102, L. 5-8.

Mr. Johnson, who was also Butler's loan officer, further testified that Butler used the CDs as collateral for a loan of approximately $50,000. Mr. Johnson explained three options to Butler with regard to how he might secure the loan. *See* Transcript at P. 103, L. 11-23. Of these three options, two required an appraisal and a higher interest rate. *See Id.* According to Mr. Johnson, Butler chose the option that utilized the CD as collateral to obtain a lower interest rate and save money by forgoing an appraisal. *See* Transcript at P. 103, L. 6-19. Respondents

did not refute Mr. Johnson's testimony about why Butler chose to use the CD as collateral for a loan.

Mr. Johnson also testified that, after Butler's death, ownership of the CDs automatically transferred to Appellant. *See* Transcript at P. 100, L. 14-25. For that reason, Mr. Johnson testified that Appellant was the sole owner of the CDs and had full rights to all of them, except the ones pledged as collateral. *See* Transcript at P. 101, L. 1-24.

Appellant testified that she did not have knowledge prior to her father's death that she was named joint owner of the CDs with right of survivorship. *See* Transcript at P. 93, L. 11-13. Appellant sought advice from the estate's counsel, Stephen M. Baker. She was informed that the certificates listed her as the owner upon Butler's death. Other than the CDs used as collateral, she could immediately seek their release. *See* Transcript at P. 11, L. 21-24; P. 69, L. 15-25; P. 70, L. 1-4. Appellant also contacted her personal attorney, Ronald Bradley, who gave the same advice. *See* Transcript at P. 114, L. 15-17; P. 115, L. 15-16.

At trial, all witnesses acknowledged that Butler had been of sound and competent mind and had not been unduly influenced. *See* Transcript at P. 10, L. 10-25; P. 41, L. 25; P. 42, L. 1-6; P. 62, L. 10-17; P. 71, L. 5-11; P. 104, L. 13-19. There was no testimony or documents provided which indicated Butler had set up the CDs for the convenience of the parties or expressed an intent with regard to the

CDs other than what was manifested on the face of the certificates.

After the trial court's decision to allow introduction of both Butler's and Viola Sandahl's wills, Respondents focused on Article IV of the Butler's will, which provided that his estate be divided equally between his children and stepchildren. *See* Transcript at P. 96, L. 25; P. 97, L. 1-2. Counsel for Respondents repeatedly asked the various witnesses if they had any knowledge as to why Butler would want to exclude them from receiving an equal share of the five CDs in question. *See* Transcript at P. 94, L. 15-16; P. 97, L. 3-14; P. 78, L. 1-6. Respondents' counsel, along with Respondents themselves, interchangeably referenced the two paragraphs contained in Article IV, while implying the breath of the bequest to his wife that included reference to IRAs, insurance policies and checking accounts, also governed the second paragraph, which provided for his children and stepchildren and included only his "entire estate." *See* Transcript at P. 141, L. 24-25; P. 138, L. 17-24. There was no dispute that Butler's will, drafted four years before the joint CD account was set up, did not reference the account. All parties agreed that the cabin that sold for $275,000 would remain in the estate. *See* Transcript at P. 40, L. 11-14. It wad distributed to all of Butler's children and stepchildren as set forth in the will.[1] *See* Transcript at P. 120, L. 19-22.

Throughout the trial, all witnesses acknowledged that Butler had a legal

[1] The Inventory also discussed that there was another approximately $50,000 included in the probate estate.

right to name whomever he wanted a joint tenant on any accounts, change beneficiary forms, and decide the terms of the distribution of his estate. *See* Transcript at P. 59, L. 15-18; P. 71, L. 2-4; P. 81, L. 20-23. Respondents' counsel even conceded this much during his closing argument, stating, "And we will not dispute for one second that Mr. Butler had an absolute right to do what he wanted to with that money." Transcript at P. 139, L. 8-9. Although Respondents testified of their belief that Butler intended to divide the entire estate, including his insurance and the CDs evenly between all of his children and stepchildren, this assertion was refuted by their own admissions. For example, Respondent Montognese acknowledged that her father had made changes in the beneficiary forms on his life insurance policies following Viola Sandahl's death. On one, he left Ms. Montognese and Appellant as named beneficiary, and on another, he only named his natural children thereby completely cutting out the stepchildren. *See* Transcript at P. 46, L. 9-19; P. 47, L. 5-18. Ms. Montognese further acknowledged that she did not offer or intend to offer these proceeds back to the estate to be divided with the others. *See* Transcript at P. 48, L. 8-14. Similarly, none of the beneficiaries who have received proceeds have agreed or offered to turn them over to the estate to be divided with the stepchildren. None of the Respondents are making a claim that these assets should be a part of the estate and distributed in accordance with the will. *See* Transcript at P. 117, L. 7-22; P. 118, L. 9-25; P. 119,

L. 1-8.

No evidence was presented of any oral or written communications being made during the time immediately leading up to or at the time of creation of the CDs, which tended to indicate that Butler had an intention of doing anything other than what was stated on the CDs. In lieu of any evidence of Butler's actual intention, Respondents turned to evidence that should have been ruled irrelevant and inadmissible to the decision. This included the introduction of the wills executed years earlier by Butler and Viola Sandahl, long before the CDs were set up. Respondents made other unsubstantiated inferences such as the inquiry into the relationship between the decedent and the children and stepchildren, Butler's use of CDs as collateral, and the source of the funds Butler used to purchase the CDs.

Prior to trial, Appellant brought a motion in limine for purposes of excluding Butler's will and limiting testimony regarding the relationship between the parties and other factors, but this motion was denied. *See* Transcript at P. 6, L. 5 through P. 10, L. 10. After Respondents rested their case, Appellant moved for a directed verdict, which was also denied. *See* Transcript at P. 98, L. 2-4. Appellant requested specific jury instructions explaining the difference between probate and non-probate, i.e., non-estate, assets so that the jury would understand that funds held in joint tenancy vest in the survivor immediately upon death of the other joint

owner, and thus are not to be considered part of the "entire estate," the phrasing used in Butler's will. The trial court denied this request. *See* Transcript at P. 131, L. 9-14.

The trial court erroneously, but consistent with its November 4, 2008, decision, allowed testimony about the relationship between Butler and the various heirs/devisees. *See* Transcript at P. 44, L. 6-25; P. 45, L. 1-12; P. 58, L. 14-16. Two of Butler's natural children had been estranged from him, one for many years due to a rift over a failure to repay a loan. *See* Transcript at P. 112, L. 21-25; P. 140, L. 23-24. The other estrangement had occurred within six months of Butler's death. *See* Transcript at P. 36, L. 2-6; P. 37, L. 1-9; P. 58, L. 17-19. Only Appellant, the joint owner of his CDs, had maintained an ongoing relationship with her father. *See* Transcript at P. 62, L. 4-9; P. 71, L. 14-17. Further, although Jack and Steven Sandahl, two of the stepchildren, testified they had a good relationship with Butler, like all of Respondents' other witnesses,[2] they too failed to provide any testimony or other evidence of Butler's actual intention with regard to the CDs. *See, gen'ly,* Transcript at P. 50 (Jack Sandahl) and P. 77 (Steven Sandahl).

A final factor cited by the trial court as support for its ruling is the source of the funds used for the CDs. Respondents Montognese testified that she thought

[2] The trial transcript is devoid of any direct evidence of the decedent having an intent other than that the CDs should become Appellant's as reflected in the CDs' election.

insurance and proceeds from a property on Woman Lake were partly used to purchase the CDs and partly to buy a cabin on Little Boy Lake. *See* Transcript at P. 39, L. 22-25; P. 40, L. 1-4. Jack Sandahl agreed with this testimony, testifying that the property on Woman Lake was sold, with the sale proceeds, and fire insurance proceeds partly used to buy the CDs. *See* Transcript at P. 53, L. 22-25; P. 54, L. 2. He also testified the Woman Lake property had been owed by his mother prior to marrying Butler. *See* Transcript at P. 54; L. 13-15. Steven Sandahl testified that $100,000 in fire insurance proceeds were for the contents of the structure on the Woman Lake property. *See* Transcript at P. 79, L. 9-18. None of these three witnesses stated the basis for their knowledge of the source of funds used to purchase the CDs, or provided any documentary evidence tracing the fire insurance or sale proceeds. Ms. Montognese testified that the structure on the Woman Lake property was burned down after Viola Sandahl's death. *See* Transcript at P. 39, L. 9-11. There was no testimony regarding ownership of the contents of the structure on Woman Lake prior to it being burned down.

ARGUMENT

I. APPELLANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL.

Appellant's first assignment of error is the trial court's denial of Appellant's motions for a directed verdict, judgment notwithstanding the verdict, and for a new

trial. The core of Appellant's argument is that she is entitled to judgment as a matter of law because Respondents failed to present any evidence whatsoever, let alone clear and convincing evidence, that Butler had an intention contrary to that which he expressed when he purchased the CDs. Appellant also challenges the Court of Appeals' ruling that the trial court properly admitted into evidence Butler's and Viola Sandahl's wills and testimony regarding the quality of Butler's relationships with the various parties. Appellant asks that these rulings be reversed and for the matter to be remanded for entry of judgment in Appellant's favor or for a new trial.

A. The Trial Court Erred By Denying Appellant's Motion For Judgment Notwithstanding The Verdict.

Judgment notwithstanding the verdict is proper if there is insufficient evidence or rationale for the jury to find for that party on that issue. *See* Minn. R. Civ. P. 50.02. A similar standard applies to a directed verdict motion. *See* Minn. R. Civ. P. 50.01. When a trial court considers a motion for JNOV it must view the evidence in a light most favorable to the nonmoving party and determine whether the verdict is manifestly against the entire evidence or whether the moving party is entitled to judgment as a matter of law despite the jury's findings of fact. *See Obst v. Microtron, Inc.*, 614 N.W.2d 196, 199 (Minn. 2000). The standard of review is thus *de novo*. *See id.* Where JNOV has been denied by the trial court, it should be affirmed if "there is any competent evidence reasonably tending to sustain the

verdict." *Rettman v. City of Litchfield*, 354 N.W.2d 426, 429 (Minn.1984) (quoting *Sandhofer v. Abbott-Northwestern Hospital*, 283 N.W.2d 362, 365 (Minn. 1979)). Further, the verdict must not be reversed so long as it is supported by any reasonable theory of the evidence. *See Stumne v. Village Sports & Gas*, 243 N.W.2d 329, 330 (1976).

Here the record is essentially devoid of any evidence of a kind and quality that, together or alone, could reasonably be said to overcome the presumption of Appellant's right to survivorship by clear and convincing evidence. Rather, Respondent's evidence was scant, all of a general nature, and failed to implicate at all what Butler's actual intention was at the time he purchased and/or renewed the CDs, or at any time thereafter, thus leaving his recorded election as the only evidence of his actual intention.

1. Evidence of actual intent is required to rebut the presumption of joint tenancy with a right of survivorship.

It is undisputed that Butler, at the time he obtained the five CDs in June 2003, was supplied with a form he could use, and did use, to select the type of account ownership he desired. This much was testified to by Craig Johnson, Butler's loan officer. On each CD, Butler marked an 'X' next to the option described as "Joint Account—With Survivorship." The second page of each CD included a description of the account ownership options, including a description for Joint Account With Survivorship, which made very clear that upon Butler's

death the account would belong to the other joint account holder, in this case Appellant. Due to Butler's knowing election, and pursuant to Minn. Stat. § 524.6-204(a), the CDs belonged to Appellant "unless there is clear and convincing evidence of a different intention...." Minn. Stat. § 524.6-204(a).[3] The statute does not address what might constitute such "clear and convincing evidence of a different intention," but existing case law from both Minnesota and other jurisdictions demonstrates the quality and quantity of evidence previously accepted and judged sufficient to overcome the presumption.

In *Hopper v. Rech*, 375 N.W.2d 538 (Minn. Ct. App. 1985) the Court of Appeals applied Minn. Stat. § 528.05, predecessor to § 524.6-204. The language of each is virtually identical. There the decedent's niece was the named joint account holder with right of survivorship on several accounts, only two of which had been opened by the decedent, with the remainder having been opened by the niece, who testified the decedent directed her to name herself as the joint holder, but gave no indication whether he intended to establish survivorship rights. *See id.* at 540. The niece had in the years prior to execution of the decedent's will been of great help to him in the handling of his financial affairs, a task at which he was somewhat infirm. *See id.* The decedent's will gave 25% of his residuary to the

[3] The statute also allows for the presumption of survivorship rights to be overcome by a provision in a valid will that otherwise disposes of the joint account and specifically refers to it. This provision is not implicated here because Butler's will included no such provision specifically referring to any one or more of the CDs.

niece, while giving only 12.5% each to two other nieces. *See id.* When he died the niece claimed the joint accounts as her own, which along with her bequest in the will would have resulted in her receiving 81% of the residuary, rather than the 25% stated in the will. *See id.* The estate's special administrator brought a successful action for return of the funds to the estate. *See id.* This result was affirmed by the Court of Appeals based on evidence of the decedent's intent at the time the accounts were opened. *See id.* The Court's reasoning is quoted at length:

> No evidence was presented at trial that showed decedent intended to establish survivorship rights for appellant; thus, the trial court relied on respondent's evidence showing that decedent lacked the requisite intent. The trial court found that appellant was aware of the significance of survivorship accounts, but appellant testified that neither she nor anyone else ever discussed the issue with decedent. The only evidence regarding the addition of appellant's name to the accounts was her testimony that decedent told her he wanted her name on them, but that he did not give her any explanation for this decision.
>
> There was significant evidence that decedent had a limited ability to understand the details of financial matters and that he relied heavily on other people as well as appellant to handle those matters for him. For example, appellant testified that when she reviewed over 1500 personal checks that decedent had written over the years, she did not find any that decedent had filled out himself. Rather, his custom was to have the store clerk fill in the amount and other information and he would only sign the check. The example of his entering into a contract to sell his land for a little over one quarter of the price that appellant eventually helped him get also shows his lack of sophistication and inability to intelligently handle his finances.
>
> In addition, decedent's will, executed before any of these accounts were changed to include appellant's name as joint accountholder, left 25% of his estate to appellant. The will's provisions show decedent

> intended to reward appellant handsomely for the care and attention that she had given him; they also show that he intended that she receive 25% of his estate, not 81%.
>
> All of these evidentiary items support the finding that decedent wanted appellant's name to be included on the accounts only so that she could conveniently manage them for him and not to create survivorship rights in her.

Id. at 541-42.

From this quotation the kind and quality of evidence that meets the clear and convincing standard begins to become clear. Most important is evidence directly touching upon the creation of the accounts themselves. For example, the fact that the niece was the one who actually opened the accounts and selected the joint ownership with rights of survivorship option, while knowing the significance of this choice. In addition, the niece's testimony was the only evidence regarding how her name came to be added to the accounts, i.e., that she was told to do so without any explanation. This was crucial evidence that the decedent had some other intention besides conferring survivorship rights upon the niece. Also important was that the decedent was unable to safely handle his own financial affairs, and thus vulnerable to double-dealing. The decedent's will was relevant only to show that the niece has already been rewarded with a bequest double the value of that given to her fellow nieces, thus making it less likely that the decedent would also reward her with the funds in the joint accounts.

Further illustration of the type, amount and quality of evidence required to rebut the presumption in favor of survivorship rights is found in *Estate of Nordorf*, 364 N.W.2d 877 (Minn. Ct. App. 1985). There the Appellant, as in *Hopper* and in the instant case, argued that the evidence was insufficient to meet the clear and convincing standard. *See id.* Though the case was officially decided on separate grounds, the Court of Appeals held in any event that the evidence was sufficient to rebut the presumption in favor of survivorship rights. *See id.* at 880. This evidence included the fact that just before the accounts were changed to joint ownership the decedent had suffered reduced mental capacity due to a stroke, several days after which her cousin brought two signature cards from the bank where the decedent had her accounts without the decedent requesting them. *See id.* at 879. The cousin's stated intent in having the decedent sign the cards was merely to enable her to pay the decedent's bills, which induced the decedent to go ahead and sign them. *See id.* There was no evidence that the cousin ever told the decedent that signing the cards would result in a joint tenancy, with the cousin receiving the accounts upon the decedent's death. *See id.* Here again the facts considered important by the appeals court are those explaining how the joint account came about, who actually selected the joint ownership option, the decedent's knowledge of the effect of opting for the joint account, and the

decedent's mental capacity. This represents the entirety of the evidence relied upon by the appellate court.

In accord with *Estate of Nordorf* and *Hopper* is *Estate of Spiess*, 448 N.W.2d 106 (Minn. Ct. App. 1989), where the decedent, suffering from terminal cancer, opened a "trust" account into which he placed the bulk of his assets and named his friend the beneficiary. *See id.* at 107. Based on the circumstances surrounding the opening of this account, the funds in it were ruled part of the estate rather than property of the beneficiary. *See id.* at 109. The evidence considered as having rebutted the presumption of ownership by the beneficiary was the decedent's expressly stated intent at the time of account opening that the funds be distributed to his daughter and grandchildren, and his statement to the banker who assisted in opening the account, "Put [the beneficiary's] name on there, he will know what to do with it." *Id.* at 108. The beneficiary's expressed desire, prior to changing his mind, to give the funds over to the daughter and grandchildren was also considered evidence of the decedent's intention at the time of opening, as if the beneficiary had been asked by the decedent to so distribute the funds. *See id.* Again here the important evidence in the court's inquiry all arises from or touches upon events at the time the account was created, and thus helps elucidate the decedent's actual intent at the time. Though the Court of Appeals acknowledged

that the case involved a pay-on-death account, as with joint accounts it held that the law:

> [D]oes not preclude claimants of account funds from demonstrating that the **circumstances which surrounded the creation of the account** were such that unjust enrichment would result from allowing the funds to pass to the survivor.

Id. (Bolding added). In other words, the evidence bearing upon the decedent's intention is necessarily that which surrounds creation of the account.[4] This is starkly at odds with the evidence produced by Respondents in the instant case.

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[4] This Court has stated that the MPAA should be interpreted consistently with the case law of other jurisdictions that have faced similar issues. *See* Minn. Stat. §§ 524.1-102(b)(4) and 645.22. *See also Enright v. Lehmann*, 735 N.W.2d 326, 332 (Minn. 2007). Other states' jurisprudence on this particular issue is similar to the cases cited above in that they require specific evidence of the decedent's actual intent when the account is opened rather than circumstantial evidence of a general nature from any period in time, including years before the joint account was established. *See, e.g., Decker v. Zengler*, 883 N.E.2d 839 (Ind. Ct. App. 2008) (reversing trial court's ruling that three joint accounts belonged to the estate absent evidence of a different intention at the time the accounts were created); *Estate of Lamb*, 584 N.W.2d 719 (Iowa Ct. App. 1998) (holding presumption rebutted by specific evidence indicating that survivor's name was placed on joint account for sake of convenience, a conclusion confirmed by survivor's voluntary delivery of joint funds to the estate); *Estate of Thomas*, 532 N.W.2d 676 (N.D. 1995) (affirming determination that presumption of survivorship had not been rebutted by clear and convincing evidence of a different intention); and *Barham v. Jones*, 647 P.2d 397 (N.M. 1982) (rejecting argument that survivor was named joint account holder purely for sake of convenience due to a dearth of evidence of a different intention at the time the account was created).

2. Respondent's evidence is wholly insufficient to meet the clear and convincing standard.

As demonstrated above, rebutting the presumption in favor of survivorship rights with clear and convincing evidence of a different intention requires production of evidence of events surrounding the creation of the joint account. Examples of this from the cited cases include the decedent's mental capacity at the time, statements by the decedent or the joint owner that the account was opened for the sake of convenience, admissions by the surviving owner that the account was meant to be divided equally, expressions by the decedent of a desire that the funds be disposed of in a manner different than simply going to the joint holder, that the account was opened by the survivor rather than the decedent, and the decedent's lack of understanding of the ramifications of choosing a joint account with survivorship rights.

Here, however, Respondents did not present one iota of evidence surrounding Butler's purchase of the CDs or directly implicating his intentions when he selected the joint ownership option, let alone evidence showing Butler was of unsound mind, unduly influenced or coerced, or unaware of the consequences of his choice. Instead, Respondents produced, and the Court of Appeals relied on, evidence that (1) Appellant was unaware of the CDs while Butler was alive, (2) Butler did not favor Appellant over the others, (3) the CDs

were purchased with Butler's wife's nonmarital assets,[5] (4) Appellant referred to the CDs as "dad's accounts," and (5) Butler used one of the CDs to secure a loan on his manufactured home, an asset of the estate. Whether considered together or apart, none of this constitutes clear and convincing evidence that Butler had an intention other than that expressed when he purchased the CDs.

The fact Appellant was unaware of the CDs' existence is completely irrelevant. There can be no doubt that had she known of them, Respondents would simply argue the CDs were opened with Appellant as joint owner for the sake of convenience. Her lack of knowledge belies any such claim, however. Perhaps Butler intended the CDs to be a surprise gift to Appellant. This is more likely than the incredible notion that Appellant's ignorance of their existence necessarily means that Butler intended the CDs to be estate assets.

The contention that Butler did not favor Appellant over others is also insignificant and has no bearing on what his intention was at the time he bought the CDs. Indeed, it is clear from the evidence that Butler did show favoritism in the

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[5] Appellant contests this finding on the ground that no tracing evidence was introduced to prove the precise source of these funds, which had been intermingled in Butler's account prior to being used to purchase CDs. Further, even if the funds had been a pre-marital asset of Viola Sandahl, this is not evidence of Butler's intention regarding disposition of the CDs, but rather is instead evidence of what a fair result should be. *See, e.g., In Re Estate of LeBrun*, 458 N.W.2d 139, 144 (Minn. Ct. App. 1990) (rejecting argument that the use of non-marital funds indicated an intention other than for decedent's wife to receive the funds as the surviving joint-owner).

treatment of the children given that after Viola Sandahl died he changed the beneficiary designation on his life insurance policies to list only his natural children, a fact unknown until he died, and a fact denied by Ms. Montognese until confronted with proof that she and her natural siblings received insurance proceeds not shared with the stepchildren.[6] *See* Transcript at P. 48, L. 8-14. This did not prevent the trial court from seizing on this rationale in ruling against Appellant in its May 6, 2009 Order:

> The jury could have inferred from the testimony that there was no special relationship between Ms. Kissack and the decedent that would have justified a substantially greater portion of the estate going to her rather than the other children or stepchildren. Testimony regarding the decedent's relationship with his stepchildren could have led the jury to infer that he would not wish to deprive them of the assets in contention.

App. A-0007. This requirement that Appellant prove some special circumstance that would justify Butler giving her the CDs effectively shifted the burden of proof from Respondents to Appellant when it should have been the other way around. There is simply no support under statute or case law that requires a party to have a special relationship with a decedent in order to receive a bequest, be a beneficiary, or have survivorship rights to a joint account, and the lack of such a relationship in no way implicates a decedent's intention when opening a joint account. While the

[6] Ms. Montognese also grudgingly conceded that she had not shared, and had no intention to share, these insurance proceeds equally among all the siblings, both natural and step. *See* Transcript at P. 45, L. 22-25 through P. 48, L. 1-14.

existence or lack of such a special relationship is relevant to what might be fair under the circumstances, fairness is not the issue. Butler's actual intention is the issue, and whether Appellant merited a greater portion of the estate is irrelevant and not proper support for the jury's decision. This and the other evidence presented by Respondents was geared toward demonstrating the unfairness of allowing Appellant to keep the CDs, and served as an invitation to the jury to second guess what Butler knowingly chose.

That the source of the CD funds may have been Viola Sandahl's nonmarital assets and insurance proceeds therefrom, inherited by Butler pursuant to Sandahl's will, is also of little if any import.[7] Butler was under no legal obligation to distribute these assets equally upon his death as a result of his and Sandahl's wills.[8] Indeed, they were *his* funds, and no longer Sandahl's if they ever were hers, and he was thus free to do with them as he pleased, which he did when he named Appellant the joint account holder with survivorship rights. Further, Steven Sandahl stated that $100,000 of the fire insurance proceeds was attributable to the contents of the structure. Since Butler was the only one living there, it stands to

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[7] Appellant disputes such a finding as there was a dearth of reliable evidence relating to the source of funds used to purchase the CDs, and none of the witnesses—Ms. Montognese, Jack and Steven Sandahl—explained how they came to conclude the CDs were purchased with funds derived from Viola Sandahl's pre-marital assets.

[8] *See Neff v. Poboisk*, 161 N.W.2d 823, 825 (Minn. 1968) (discussing the evidentiary requirements to prove the existence of binding "reciprocal" or "mutual" wills). This issue is discussed in greater depth below.

reason that these contents consisted of his own personal property, not Viola Sandahl's pre-marital property. Since the total value of the CDs was $100,000, it is just as likely they were purchased with the $100,000 insurance proceeds from Butler's personal property, and not with funds traceable to Ms. Sandahl's pre-marital property.[9] And while Appellant may have referred to the CDs as "dad's accounts" in her personal journal, this has nothing to do with what Butler's intention was when he bought them, and in any event is consistent with the fact that Appellant had not contributed anything to the CDs as well as her lack of any knowledge of them prior to Butler's death. Reliance on such "evidence" does nothing but reveal the weakness of Respondents' case.

Finally, the fact Butler secured a loan used to buy a manufactured home, an estate asset, using the CDs as collateral is explained by banker Craig Johnson who stated that Butler was fully apprised of the interest rate and cost advantages in doing so rather than using the underlying property or other real estate as collateral, since that would require and appraisal and mortgage. Besides which, at the time he used the CD as collateral Butler was obviously still alive, and the CDs by operation of law belonged 100% to him because he was the sole contributor to them, a status

[9] If Respondents are to be believed, the remainder of the proceeds from the sale of the Woman Lake property and the fire insurance proceeds (i.e., 100% of the sale and insurance proceeds derived from Viola Sandahl's pre-marital assets after accounting for $100,000 attributable to Butler's personal effects destroyed in the fire), were used to buy a property on Little Boy Lake, which remained an estate asset.

that remained until Butler's death when the CDs became Appellant's. It strains credulity to equate the use of the CDs as collateral for a loan on an estate asset with an affirmative intention that the CDs go to the estate rather than to the surviving joint owner. As shown above, this is certainly not the kind and quality of evidence courts have typically considered as bearing upon a decedent's intentions regarding a joint account. It does not cast any light at all on Butler's intention when he designated Appellant joint owner of the CDs, but certainly provides some shelter, however unsound, for those wanting to second guess Butler's wishes, which is exactly what the jury did here.

Instead of producing evidence that strikes at the heart of Butler's actual intention when the CDs were purchased, Respondents' evidence deals more with the issue of whether allowing Appellant to keep the CDs would be a fair outcome. Is it fair for Butler to give CDs potentially bought with Viola Sandahl's pre-marital assets to one and only one of his own natural children, to the exclusion of his wife's pre-existing children?[10] Perhaps so, perhaps not.

What has been conceded by Respondents, however, is that it was Butler's right to do so, and the issue of fairness is not one properly considered by the court or the jury. Rather, the only issue is Butler's intention. And considering the

[10] Tellingly, none of the other children who, as life insurance beneficiaries, received additional funds over and above their share of Butler's estate were willing to offer up these surplus funds to the estate for distribution under Butler's will.

totality of the evidence, even the irrelevant evidence erroneously admitted, the only reasonable conclusion at which one might arrive is that Respondents failed to rebut the presumption of ownership in favor of Appellant; Respondent's evidence simply does not constitute clear and convincing evidence of a different intention. It is vague and unclear at best and cannot reasonably sustain the jury's verdict. Respondents' proof did not even meet the simple preponderance of evidence burden let alone a clear and convincing requirement. The trial court should have granted Appellant's motion for JNOV or directed verdict.

3. The evidence conclusively proves Butler intended that Appellant receive the CDs.

Not only did Respondents fail to discharge their burden by clear and convincing evidence, their ability to do so is foreclosed by Minn. Stat. § 524.6-213, subd. 1, which states in relevant part:

> Deposits made using a form of account containing the following language signed by the depositor **shall be conclusive evidence of the intent of the depositor,** in the absence of fraud or misrepresentation, subject, nevertheless, to other disposition made by will as provided in section 524.6-204, clause (d), to establish a survivorship account: [language].

Minn. Stat. § 524.6-213, subd. 1. (Bolding added). On review below, the court held that "[i]n this case there was no conclusive evidence of intent." Court of Appeals' ruling at 11. This contention ignores the Court of Appeals' own prior holding that strict compliance with the language and format set forth in § 524.6-

213, subd. 1 is not required; rather, substantial compliance will suffice. *See Miller v. Daniels*, 520 N.W.2d 769, 770 (Minn. Ct. App. 1994). Accordingly, if a decedent opens an account and signs a form with the requisite language, or language that is substantially similar, which makes clear the account is held jointly, and that upon the death of one account holder the funds remaining become the property of the surviving account holder, it is conclusively presumed that the survivor owns the account. Such is the case here, where Butler's CDs included language substantially similar to that required by § 524.6-213, subd. 1.

When Butler purchased the CDs they were issued with a form on which he could select one of a number of account ownership options. *See* Transcript at P. 100, L. 1-25; P. 101, L. 1-12. Butler selected the option corresponding to "Joint Account With Survivorship," which clearly explained the following:

> Such an account is owned by two or more persons. Each of you intend that upon your death the balance in the account (subject to any previous pledge to which we have consented) will belong to the survivor(s). If two or more of you survive, you will own the balance in the account ownership as joint tenants with survivorship and not as tenants in common.

Id. Butler also affixed his signature to the first certificate in the five-certificate series. *See id.* In light of these facts, and by operation of Minn. Stat. § 524.6-213, subd. 1, Butler's intention that Appellant become the sole owner of the CDs upon Butler's death is conclusively proved and thus invulnerable to attack. Therefore,

any claim to the contrary by Respondents is futile, regardless of the quantity and quality of evidence they might muster in an attempt to prove a different intention.

Even if there were no statutory provision rendering Butler's intention conclusive, the facts already demonstrate beyond doubt the truth of the contention. There is no evidence or claim that Butler was anything but a man of sound mind and fully capable of handling his own financial affairs. There is no claim or evidence that he was unable to read, or needed checks written out for him, or that he was suffering from any physical or mental infirmity at the time he bought or renewed the CDs. On the contrary, the evidence shows that Butler made an educated, knowing, and conscious decision as to the form of ownership in which the CDs would be held. Armed with the knowledge of what the joint ownership with survivorship option meant, he selected this option and named Appellant the joint owner. This is conclusive evidence of Butler's actual intention. Indeed, there was no better or more probative evidence of his intention presented to the jury.

There is no evidence that at the time he bought the CDs Butler told anyone that Appellant would "know what to do with it," as occurred in *Estate of Spiess*, or otherwise uttered anything that evinced an intention other than for Appellant to become the sole owner of the CDs. Further, there is no evidence that Butler made any statements to anyone at any time, before, during or after, to the effect that he had an intention at odds with the option he selected for holding the CDs.

Accordingly, there is no reason why Butler and Appellant should not enjoy the protection of § 524.6-213, subd. 1, which renders conclusive the evidence of Butler's intention by virtue of the requisite language and his signature on the form. The jury's verdict amounts to second guessing Butler's choice. It is not supported by the evidence at all and therefore cannot be sustained by any reasonable interpretation of the evidence; it should be set aside and judgment entered in favor of Appellant.

B. Sound And Prudent Public Policy Requires A Bright-Line Rule Favoring The Right And Ability To Avoid Probate.

It is axiomatic that the right and ability of individuals to dispose of their assets as they see fit, and to have the confidence that, after death, their wishes will be carried out, is important to society as well as the legal system that bears the cost when expectations are unsettled. The Minnesota Mutli-Party Accounts Act (MPAA) was enacted at least in part to help settle the law as it applies to jointly-held accounts, and thereby provide more certainty as to the disposition of such accounts. *See Enright v. Lehmann*, 735 N.W.2d 326, 332 (Minn. 2007).

A joint account is frequently used to avoid probate; this is precisely because it allows one to make a gift to another upon death while forgoing the time and expense of drafting a will, and the potentially long, drawn out and expensive probate process, thus maximizing the assets available for distribution to heirs and/or surviving joint account owners. *See id.* Indeed, prior to passage of the

MPAA and during a time when the application of gift theory to decide the disposition of joint accounts often led to inconsistent and unsettled results, this Court referred to a joint account as a "poor poor man's will" because of the uncertainties involved. *Erickson v. Kalman*, 189 N.W.2d 381, 391 (Minn. 1971) (Kelly, J., dissenting). Attempting to dispose of one's assets by giving them to another via a joint account was essentially a crapshoot. Joint accounts with survivorship rights, if they are to fulfill the role and purposes of the poor man's will, must be a simple, straight forward and easily understood tool. *See id.* The MPAA was meant to promote this goal by lending "stability and security to the creation of joint bank accounts." *See Enright*, 735 N.W.2d at 332.

While discussing the issue of joint bank accounts serving as the poor man's will in *Erickson*, Justice Kelly in his dissent suggested the Legislature might enact a statute that made it possible to challenge the survivorship rights of a joint account holder only by proof of fraud, unsound mind or undue influence. *See Erickson*, 189 N.W.2d at 391. Justice Kelly opined that under such a regime, where joint accounts were used by those with knowledge of the legal ramifications, the intended result would be reached. The MPAA was at least a partial remedy for Justice Kelly's concern by making it much more difficult to undo the effect of the joint account designation. It is against this backdrop that the Court should consider the issue of what quantity and quality of evidence will suffice to rebut the

presumption that the surviving joint account owner receives sole and exclusive ownership of the joint account upon the death of the other joint owner.

In order to achieve the intent of the Legislature in enacting the MPAA, provide confidence and certainty in disposing of one's assets via a joint account, honor the wishes of those people who use such accounts as a "poor man's will," and deal with challenges, such as Respondents', resting on sparse and/or irrelevant evidence, this Court should craft a bright-line rule applicable to these situations. Such a rule should provide that the standard of clear and convincing evidence of a different intention, as set forth in Minn. Stat. 524.6-204(a), can be met only by evidence of the decedent's *actual* intent at or around the time the joint account was created. Such evidence would necessarily be restricted to that which arises in the time period surrounding account creation, meaning that the contents of a will executed seven years prior would be of little or no help. The source of the funds, so long as they belonged to the decedent, would be irrelevant. Whether only the decedent, or the decedent and the other joint owner(s), or everyone knew about the account would also be irrelevant. A history of favoritism, or lack thereof, toward any one or more heirs would not matter either. Rather, only that evidence touching upon the decedent's *actual* intention at the time of account opening should matter.

Relevant and probative evidence might include that which indicates the decedent opted for a joint account for the sake of convenience, such as where the

surviving joint owner's name was placed on the account to make it easier for the other's bills to be paid, as with some of the cases cited above. It might also include a statement made to a banker at account opening to the effect that the surviving owner will "know what to do with" the funds, as in *Estate of Spiess*, 448 N.W.2d at 106, or some other utterance indicating the decedent wanted the surviving joint owner to distribute the money to another party or parties rather than assume ownership themselves. A lack of understanding of the ramifications of selecting joint ownership with survivorship rights at the time of account opening would also be relevant, as would the fact that the surviving joint owner was the one who actually opened the account on behalf of the decedent and selected joint ownership with survivorship rights of their own accord, rather than at the direction of the decedent.

Where it is shown, as in the instant case, that the decedent was fully informed as to the meaning and legal effect of the chosen option, and fully in charge of his or her mental faculties, able to handle his or her own financial affairs without assistance, and went ahead and chose the joint ownership option, the selection and desired disposition should be beyond challenge. Indeed, by enacting Minn. Stat. § 524.6-213, subd. 1, the Legislature has expressed just such an intent to hold the decedent's desire sacrosanct. This intent the Court should take into

account in deciding this case, which will provide direction for future testators, lawyers and judges.

It goes without saying that, at bottom, only where the evidence produced by the challenger is at least of the same nature and quality as the evidence showing an intention that the surviving joint owner take the assets should the presumption be overcome. However, because the applicable standard here is clear and convincing evidence rather than a mere preponderance, the evidence offered by the challenger should be even stronger and more directly probative of the decedent's actual intent than the evidence on the other side. Such is the requirement set by the Legislature in choosing the clear and convincing standard over the less-stringent preponderance of the evidence standard.

Applying this imperative to the instant case, where the evidence indisputably demonstrates that Butler, a man of sound mind and fully capable of handling his own financial affairs, selected the joint ownership with right of survivorship option with the explanation of its meaning printed on the very papers he was signing, and without making any contemporaneous statements to the contrary to anyone around him, there can be no doubt that Respondents' evidence falls far short of meeting the clear and convincing standard, let alone a preponderance standard. Accordingly, there is simply no way any jury of reasonable and objective persons

could have found that Respondents met the standard. As stated by Judge Johnson in his dissent below:

> Respondents' evidence is insufficient because it simply is not evidence of Butler's actual intention. Respondents' evidence is nothing more than factors that respondents believe Butler should have considered, or reasons why, in respondents' view, Butler should not have decided to establish joint accounts. Butler was presumably aware of those factors and reasons yet, nonetheless, elected to establish joint accounts with rights of survivorship.
> ********
> [T]he opinion of the court infringes on a person's freedom to make a disposition of property during his or her lifetime with confidence that the disposition will be effected after his or her death.
> ********
> There is no precedent for the proposition that the MPAA's statutory presumption of survivorship rights may be rebutted by evidence that the decedent **should have** made a different account designation, without evidence that the decedent **actually intended** a different account designation.

Estate of Butler, No. A09-1208 at 15-19 (Minn. Ct. App., May 25, 2010) (Bolding added).[11]

Judge Johnson zeroed right in on the deficiency in Respondents' case, and accurately articulated the effect of the majority ruling below, i.e., unsettled

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[11] The majority below also conceded that Respondents produced "no direct evidence of Butler's intent with respect to the CDs." *Estate of Butler*, No. A09-1208 at 10. The majority went on to state, however, that "ample circumstantial evidence supported the jury's verdict," but paid no attention to the fact that this "ample circumstantial evidence" was not evidence of Butler's actual intention at the time he purchased the CDs. Rather it was of a general nature and bore no relation at all to Butler's actual intention. On the other hand, though, evidence produced by Appellant went directly to the heart of Butler's intention at the time he bought the CDs.

expectations and lack of confidence that one's intent will be carried out. Judge Johnson also put his thumb directly on what transpired in this case. Clearly the jury, after hearing the evidence, took it upon itself to go ahead and do for Butler what it decided he "should have" done himself—give the CDs to all of the children instead of just Appellant. The jury took this action, second-guessing Butler, despite Respondents' failure to present any evidence that Butler "actually intended" a result different than that which he expressed by opting for joint ownership with survivorship rights on the forms. While it seems the jury determined that Appellant's receipt of the funds was not fair, and sought to correct that perceived unfairness, that was not the jury's role, nor was fairness the relevant legal inquiry.

Given Respondents' complete failure to muster any contradictory evidence of Butler's actual intention, the case should never have even been submitted to the jury. The trial court should have granted Appellant's motion and directed a verdict in favor of Appellant. Considering the evidence that was presented, and even viewing it in a light most favorable to Respondents, there is no reasonable theory that would support the verdict. The verdict is manifestly and palpably contrary to the evidence and the law, should be set aside, and judgment as a matter of law entered in Appellant's favor.

C. The Court Of Appeals Misconstrued And Misapplied *Rutchick v. Salute.*

In ruling against Appellant below, the two-judge majority placed great reliance on the case of *Rutchick v. Salute*, 179 N.W.2d 607 (Minn. 1970), for the proposition that "[t]he evidence, considered as a whole, is sufficient to support the jury's verdict." *Rutchick* involved the disposition of a savings certificate jointly held in the name of the decedent and his nephew. *See id.* at 608-09. The court recognized the problems inherent in determining proper ownership of joint accounts, stating:

> The nature of the legal ownership created by the arrangement does not fall within any traditional category. A characterization of the nature of the property interest created has meaning only in the context of the particular circumstances out of which it grew.
> ********
> Because the joint bank account serves divergent functions and is adaptable to varying uses, it often creates legal and equitable dilemma which have prompted legal scholars to discuss the subject on a number of occasions.

Id. at 610. Determining ownership was none too easy under the law as it then existed. Specifically, the *Rutchick* court considered the deposit "in the nature of gifts [] governed by the rules applicable to gifts." *Id.* at 610. Accordingly, it viewed its task as "searching the record for evidence of donative intent." *Id.* Ultimately, it deemed unpersuasive the nephew's sole reliance upon "the stark and unilluminated evidence of the fact of the deposit and the existence of the signature card supported by the presumption of ownership derived from [the applicable

statute]." *Id.* at 611. Assessing the evidence at hand, the court found that "[i]n those cases where the donee has prevailed, there was additional fact evidence of **words and conduct of the donor** which evidenced the gift." *Id.* at 611. (Bolding added). Continuing, the court stated, "[h]ere the record is barren of fact evidence by word or conduct which would indicate the donor intended to establish a gift to [the nephew]." *Id.* In other words, the court placed the burden on the nephew to produce some evidence of donative intent on the part of the decedent, e.g., words or conduct indicating the decedent intended to make a gift to the nephew by including him as a joint account owner with right of survivorship, above and beyond the fact of the deposit and the signature card. Absent such evidence, the funds would be property of the estate. Ultimately, the court determined the nephew's evidence was insufficient to show donative intent:

> Signing the signature card was the only act performed by [the decedent] prior to his incompetency bearing on his intention. There were no **conversations had by [the decedent] with any other persons as to his intent** to make a gift to [the nephew] at that time. In [three other cases] **conversations with third parties** were deemed adequate to support intent by the donor to make a gift....

Id. (Bolding added). The court thus looked for actions or statements to third parties by the decedent that directly indicated donative intent and found the record lacking. Accordingly, it ruled against the nephew and held the funds belonged to the estate. *See id.* at 612.

It is worthwhile to take account of *Rutchick* for two reasons. First, it illustrates the state of the law applicable to joint accounts at the time *Rutchick* was decided, thus elucidating the court's rationale. Clearly the *Rutchick* court placed the burden on the named joint owner to prove the decedent intended that the funds go to the joint owner on death, rather than become property of the decedent's estate. In 1973, however, perhaps in response to the uncertainty engendered by application of gift theory to joint accounts, the Legislature ushered in a sea change in this area by enacting the MPAA in sections 528.01-528.15 of the Minnesota Statutes. *See Enright*, 735 N.W.2d at 330. The MPAA was later inserted into the Uniform Probate Code and renumbered §§ 524.6-201 to 524.6-214 without changing the statutory text. *See id.* The critical change wrought by the MPAA is the creation of a very strong presumption that the jointly held funds belong to the surviving account owner rebuttable only by "clear and convincing evidence of a different intention...." *See* Minn. Stat. § 524.6-204(a). This change essentially turned the world as it had existed when *Rutchick* was decided completely upside down. Prior to the MPAA, as demonstrated in *Rutchick*, the burden of proving donative intent was on the surviving joint owner. This was so even in the face of the then-existing statutory presumption in favor of the surviving joint owner. Under the MPAA, not only is the burden on the estate, but it is a much higher burden—clear and convincing evidence.

Rutchick is also important to consider in deciding the instant case because of its characterization of the type of evidence required to prove a decedent's intent with respect to jointly held funds: "[F]act evidence of words and conduct of the donor which evidenced the gift," and, "Conversations with third parties [] deemed adequate to support an intent by the donor to make a gift." *Rutchick*, 179 N.W.2d at 611. In essence, what the *Rutchick* court wanted to see if it were to rule in the survivor's favor was conduct or statements by the decedent relating to the jointly held funds that evinced an intent to donate the funds to the survivor. This is just the sort of evidence that remains relevant in proving a decedent's intention today, under the MPAA, except that instead of the burden being on the surviving joint owner, the burden is now on the estate and anyone else challenging the right of survivorship, and it is a much greater burden at that given the requirement of *clear and convincing* evidence rather than a mere preponderance of the evidence.

There can be no doubt that the result in *Rutchick* was dictated by which party had the burden of proving donative intent or lack thereof. There, had the estate been saddled with the burden of showing a lack of donative intent, i.e., an intention different than wanting the joint account to go to the nephew, then the nephew wins due to the absence of any evidence indicating the decedent's intent with respect to the joint account, e.g., "[F]act evidence of words and conduct of the donor which evidenced the gift," or, "Conversations with third parties [] deemed

adequate to support an intent by the donor to make a gift." *Rutchick*, 179 N.W.2d at 611. Because the MPAA shifted the burden onto the party challenging the right to survivorship, now the shoe is on the other foot, and the absence of any evidence indicative of the decedent's actual intention must necessarily result in the surviving joint owner being declared the rightful owner of the jointly-held funds.

It is therefore clear that rather than militating in favor of Respondents, the *Rutchick* ruling actually favors Appellant's case by a wide margin. As previously discussed, Respondents failed to produce one scintilla of evidence of Butler's *actual* intention, e.g., "[F]act evidence of words and conduct of the donor which evidenced the gift," or, "Conversations with third parties [] deemed adequate to support an intent by the donor to make a gift." *Id.* There was no evidence that Butler conducted himself in a way, or made any statements, that would indicate an intention contrary to that which he expressed by knowingly opting for joint ownership with a right of survivorship and naming Appellant the other joint owner. Butler never told anyone he wanted the CDs to pass as part of his estate, or that he had named Appellant joint owner out of convenience or to make it easier to distribute the CD funds to the other heirs under his will, or for any other reason contrary to his expressed intent on the face of the CDs. Indeed, there is no evidence that Butler ever discussed the CDs with anyone other than his banker. None of his heirs even knew the CDs existed. This last fact alone makes clear that

Butler never expressed any intentions at all to any of his children regarding disposition of the CDs, since if he had, one or more would have known of the CDs' existence prior to Appellant's discovery of them while settling Butler's affairs. Respondents' collective ignorance of the CDs' existence, in other words, renders it impossible for any of them to know anything regarding Butler's intentions regarding the CDs beyond that expressed on their face. Accordingly, none of them had any evidence to offer relevant to Butler's intention regarding disposition of the CDs upon his death.

The Court of Appeals, however, completely ignored the imperatives created by the MPAA's effective shift of the burden to Respondents by essentially holding that since the evidence in *Rutchick* was sufficient to support the trial court's ruling that the funds belonged to the estate, the evidence here, which is of a similar nature, must therefore require the same result. The truth of this assertion is proven by the Court of Appeals' characterization of *Rutchick* in its citation parenthetical:

> holding similar evidence sufficient to support a finding that a savings certificate was intended to be distributed according to the terms of the decedent's will; emphasizing that 'the question presented is one of fact' and concluding that 'the record supports the findings of the [district] court.'

This parenthetical starkly illustrates how the court effectively, yet erroneously, applied the rejected standard from *Rutchick* in the instant case instead of the opposite and more stringent clear and convincing standard required by the

subsequently enacted § 524.6-204(a). This had the effect of shifting the burden onto Appellant through the court's determination that "similar evidence" in *Rutchick* was good enough to support awarding the funds to the estate, and therefore the same result should be reached in the instant case. It goes without saying that this completely ignores the sea change effected by enactment of the MPAA, and thereby effectively shifted the burden onto Appellant, right where it would have been under the regime in place at the time *Rutchick* was decided.

This undeniable truth, in light of the MPAA's placement of the burden upon Respondents, and especially given the much more stringent clear and convincing standard, requires reversal of the result below and, once the correct standard is applied, entry of judgment in favor of Appellant.

D. The Trial Court's Erroneous Admission Of Irrelevant Evidence Caused Appellant Substantial Prejudice.

Evidence must be relevant to be admissible. *See* Minn. R. Ev. 402. Relevant evidence is that which tends to make the existence of any consequential fact more probable or less probable than it would be absent the evidence. *See* Minn. R. Ev. 401. Rulings on the admission of evidence are generally within the sound discretion of the trial court, and will not be cause for reversal and a new trial unless there has been a clear abuse of this discretion. *See Johnson v. Washington County*, 518 N.W.2d 594, 601 (Minn. 1994). If from a consideration of the totality of the evidence it is apparent that substantial prejudice against the complaining

party resulted from the erroneous evidentiary ruling, a new trial should be granted. *See Fewell v. Tappan,* 27 N.W.2d 648, 656 (Minn. 1947). Such is the case here.

At trial the court received into evidence over Appellant's objection the wills of Butler and his pre-deceased wife, Viola Sandahl. It also allowed in over Appellant's objection testimony regarding the relationships between the parties and Butler. As we have seen, relevant and probative evidence in a case with the current circumstances is "fact evidence of words and conduct of the donor...," or, "[c]onversations with third parties [] deemed adequate to support an intent by the donor [other than] to make a gift." *Rutchick*, 179 N.W.2d at 611. Under this standard, neither the wills nor the relationship testimony was relevant or probative of Butlers' intention respecting ownership of the CDs upon his death, and its admission caused substantial prejudice to Appellant, as evidenced by the trial court's and Court of Appeals' reliance on it in ruling for Respondents.

1. The erroneous admission of the Butler and Sandahl wills caused Appellant substantial prejudice.

As has been shown, relevant evidence of a decedent's intention with respect to jointly-held accounts is that which speaks to his or her *actual* intention with respect to disposition of the jointly-held account and arises at or around the time the account is created. Evidence arising from a period in time years prior to the creation of the account simply cannot be relevant since at that time the decedent

could not have formed any intention with regard to an account that did not then exist.

There is one circumstance where Butler's and Sandahl's wills would be relevant; however, if they were in fact "reciprocal wills" executed in the form of a contract requiring each to make a certain disposition of their assets. However, Respondents did not seek to prove, and did not argue that these wills were of a contractually binding nature. Opposing counsel specifically conceded as much during his closing argument when he stated, "And we will not dispute for one second that Mr. Butler had an absolute right to do what he wanted to with that money." Transcript at P. 139, L. 8-9. According to this Court's jurisprudence:

> Mutual or reciprocal wills are those in which two or more persons make mutual or reciprocal provisions in favor of each other, as by providing that the property of one dying first shall go to the survivor or survivors; and this may be either where all of them unite in the execution of one instrument, or where several instruments are executed by each of them separately.
> ********
> [T]he fact two wills are made concurrently does not necessarily establish them as mutual wills, but their mutuality may be shown by surrounding circumstances and parol evidence.

Neff v. Poboisk, 161 N.W.2d 823, 825 (Minn. 1968). The *Neff* Court went on to state:

> The fact that the parents executed identical wills has little significance. Indeed, it is the usual manner in which parents plan the disposition of their estates. We subscribe to the view that **execution of identical wills gives rise to no presumption that a binding contract was intended**.

> ********
> We share the misgivings thus expressed where **compelling proof of intention is absent**. A wiser rule is to presume that a husband and wife intend flexibility in the disposition of the survivor's estate. It is human experience that the 'dead hand' of a long-departed testator often creates more mischief than it prevents. Since [] the circumstances of children the grandchildren may fluctuate greatly in the course of time, the law should be slow to embalm a disposition which proves to be unrelated to the realities which exist at the time of the surviving spouse's death.

Id. at 825. (Bolding added.) (Internal citations omitted.) Accordingly, in order for Butler's and Sandahl's wills to be binding mutual or reciprocal wills, there must be some "compelling proof" that they intended to form a binding contract. No such proof was provided by Respondents, nor did they advance such an argument, and thus we are left with nothing more than two contemporaneously executed wills with identical language. Under such circumstances, and as conceded by Respondents during their closing argument, Butler was not bound in any way to distribute his entire estate in equal shares to his natural and stepchildren.

Contrary to the law, however, these identical will provisions were relied upon by the jury, trial court and the Court of Appeals as evidence of Butler's intent, under the rationale that "[t]he jury's verdict was consistent with the evidence presented to it regarding the estate plan reflected in Butler's will, which treated all of the children and stepchildren equally." *Estate of Butler*, No. A09-1208 at 10. While Butler's will may have reflected his "estate plan" at the time he executed it, he was free at all times to either change his will, or arrange for a

portion of his assets to pass outside the will and the probate process. This he did by naming Appellant a joint owner with right of survivorship.

Butler's and Viola Sandahl's wills thus had no relevance or probative value at all with regard to Butler's intention when he bought the CDs. Their admission is therefore erroneous. The reliance on them by the jury, trial court and Court of Appeals makes clear that their erroneous admission caused Appellant substantial prejudice. Absent this erroneously admitted evidence, the result would probably have been different. This requires reversal of the trial court's denial of JNOV or, in the alternative, a new trial at which the irrelevant evidence should be excluded.

2. The erroneously admitted relationship evidence caused Appellant substantial prejudice.

The trial court also admitted over Appellant's objection testimony by the various witnesses regarding the character of Butler's relationships with his various natural children and stepchildren. Again, this evidence bore no relevance to Butler's *actual* intention at the time he purchased the CDs. The only evidence relevant to this ultimate issue that was introduced was Butler's knowing selection of joint ownership with survivorship rights and naming Appellant the joint owner.

Rather, the admission of this evidence, and the wills, served no purpose and no doubt caused confusion to the jury. Subsequently, the jury was inappropriately allowed to second guess Butler and substitute their judgment for his, even though

the only evidence presented to it specifically touching upon Butler's actual, expressed intention was the CD forms showing the election he made.

This result does not comport with the law and is founded upon irrelevant evidence the admission of which was properly fought by way of Appellant's objection. While even with this improper evidence Respondents' proof was insufficient to meet the clear and convincing standard, absent this evidence Respondents' shortcoming is even clearer. There can be no doubt that the jury relied on this evidence in rendering its verdict. Appellant was therefore substantially prejudiced by the trial court's ruling on this issue, and the opposite result had the evidence not been admitted is a near certainty. Accordingly, the jury's verdict should be vacated and judgment as a matter of law entered in favor of Appellant.

CONCLUSION

At trial of this case Respondents introduced no evidence relevant to Butler's actual intention at the time he procured the CDs. Rather, the evidence Respondents produced was for the most part irrelevant to the issue at hand, which was whether Butler had an intention different than what he expressed by opting for joint ownership with right of survivorship and naming Appellant joint owner. Given that Respondents had the burden of producing clear and convincing

evidence of a different intention and failed to introduce any relevant evidence on the issue, the jury's verdict in their favor lacks the requisite evidentiary support and must be set aside. This is especially so when the erroneously admitted evidence is removed from consideration. Appellant therefore respectfully requests reversal of the trial court's denial of her motions for directed verdict and for judgment notwithstanding the verdict, and entry of judgment in her favor or, in the alternative, a new trial.

Dated: 9/7/10

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